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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-458

THE CITIES OF TEXARKANA, TEXAS AND TEXARKANA, ARKANSAS, ET AL., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 30, 1971

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v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, The Cities of Texarkana, Texas and Texarkana, Arkansas, *et al.,* pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 30, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and the order of the Court denying rehearing appear in the Appendix hereto. The decisions of the Civil Aeronautics Board which were affirmed by the Court of Appeals are lengthy. Ten copies have been filed with the Clerk of the Court with a motion for leave to file the decisions of the Civil Aeronautics Board as an unprinted appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 30, 1971. A timely petition for rehearing en banc was denied on June 2, 1971. Petitioner's motion for extension of time within which to file a Petition for Writ of Certiorari was granted by the Chief Justice extending the time for filing this petition to September 30, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 102 of the Federal Aviation Act of 1958 provides:

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> * * *

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." (49 U.S.C. 1302)

QUESTIONS PRESENTED

The petitioners applied to the Civil Aeronautics Board for improved air transportation service under the Federal Aviation Act of 1958. That Act directs the Board in considering such applications, to consider as being in the public interest, the encouragement and development of an air transportation system properly adapted to the present and future needs of the commerce of the United States and of the national defense.

1. May the Board deny an application for improved air service without making findings on the needs of the national defense when at the hearing on the application the Department of Defense submitted uncontroverted evidence that the service requested in the application is needed in the interests of the national defense?

2. In an application for improved air transportation service, where the uncontroverted evidence is that the commerce requiring the service is air cargo, as distinguished from passengers, may the Board deny the application without making findings on the needs of the air cargo commerce?

3. When the contention is made in an application for improved air transportation that the Board discriminated between cities by failing to apply the same standards to the petitioners that it applied to previous applicants, did the Board err in denying the application without making findings on that contention?

STATEMENT OF THE CASE

The petitioners applied to the Civil Aeronautics Board for improved air transportation to several points, including service to St. Louis and the Northeast. These applications were consolidated by the Board into two investigations, the *Central Route 81 Service Investigation* (Order E-23158, JA p. 17) and the *Gulf States Midwest Points Service Investigation.* (Order E-24882, JA p. 329). The Department of Defense intervened as a party in the first proceeding and presented evidence in support of Texarkana's application. That evidence was incorporated in the second proceeding by agreement of the parties. (Transcript of Hearing p. 25, JA p. 397)

The Department of Defense presented evidence that passengers and cargo to and from the defense installations at Texarkana were delayed because of the lack of adequate air transport service at Texarkana. The Department witnesses testified that millions of pounds of critical war materials, "parts of combat vehicles, helicopters, army light aircraft and all sorts of army combat equipment" from the Red River Army Depot at Texarkana were delayed in delivery, some destined to Viet Nam war zones, because of inadequate air service at Texarkana. (Exhibit DOD-O; JA 56, Transcript of Hearing pp. 1014-25; JA 84-90).

The Texarkana Parties also placed in evidence data as to the large volume of cargo originating at Texarkana and evidence that the volume exceeded that of other cities, such as, Birmingham, Alabama and Fort Smith, Arkansas* to which the Civil Aeronautics Board had granted more air transportation service. There was no challenge to or contradiction of this evidence.

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* Exhibits TXK 12, 13; JA 357-361.

In the *Central 81 Case,* the Examiner *referring to passenger traffic* (I.D., pp. 30-31; JA 127-129) concluded that there was insufficient traffic available to support all of the service Texarkana sought without a substantial increase in subsidy, and that the traffic potential was not sufficiently great to warrant the necessary subsidy support. These findings and conclusions of the Examiner were adopted by the Board (Order 69-5-30, p. 2, n. 3; JA 227).

In its petition for reconsideration, the Department of Defense stated:

> "It is submitted that the Examiner and this Board have failed to give due consideration to the past, present, and future needs of the National Defense as required by Section 102 of the Federal Aviation Act (49 U.S.C. 1302(a) and (d))." (JA 276)

The Texarkana parties in their petition for reconsideration also raised the issue that the Board failed to apply to Texarkana the standards applied to other cities with less military and cargo traffic. The petitions for reconsideration were denied (Order 69-7-170; JA 309).

In the *Gulf States-Midwest Investigation,* the Examiner, citing passenger traffic data, (I.D. pp. 44-45; JA 426-427) concluded that

> "Texarkana and Beaumont obviously lack the traffic potential to support a stop [at] either of these cities" (I.D. p. 115; JA. 466).

The Board adopted the Examiner's findings (Order 69-5-25, p. 2, n. 5, JA 516) and the petition for reconsideration was denied. (Order 69-9-18; JA 620).

The Board's decisions were appealed to the United States Court of Appeals for the District of Columbia

Circuit pursuant to Section 1006(a) of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486(a). The Board's decisions were affirmed. The Court referred only to the passenger traffic, (p. 10 of the Decision). It made no mention of the needs of the National Defense, the needs of the cargo commerce, nor of the contention by Texarkana that it had suffered discrimination.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeal Which Hold That When, in a Hearing on an Application for Transport Authority, the Issue of the Needs of the National Defense Is Raised, Findings on That Issue Are Required

A. The decisions by three-judge district courts, from which appeal lies only to the United States Supreme Court, (28 USC 1253), under substantially similar language in the Interstate Commerce Act[1] hold that

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[1] "It is hereby declared to be the National Transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (49 U.S.C. preceding Secs. 1, 301, 901 and 1001)

where the issue of the needs of national defense are raised, the administrative agency should make findings on that issue. In *Cantlay & Tanzola Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Cal. 1953), which involved an action by certain tank-truck carriers to annul an order of the Interstate Commerce Commission authorizing rail carriers of petroleum products to reduce their rates, the plaintiffs argued that the reduced rates would injure their competitive position to the detriment, among others, of the national defense. As in this case, the decision of the Commission contained no findings on this issue. In annulling the Commission's order, the Court stated (at p. 81)

> ". . . we hold that the minimum recognition of the National Transportation Policy requires an affirmative declaration by the Commission with respect to a factor so vitally affecting the public interest as does the national defense. . . ."

See also *Pacific Inland Tariff Bureau* v. *United States,* 134 F. Supp. 210 (D. Ore. 1955).

It is significant that in none of the above cases was testimony offered by the Department of Defense on the needs of the national defense. It would appear that where the Department intervenes and presents uncontroverted evidence findings on the issue should be made by the administrative agency.

The disinterest of the court below and of the Board in the views of the Department of Defense contrasts with the action of this court in *American Farm Lines* v. *Black Ball Freight,* 397 U.S. 532 (1970). There the Court held that the Interstate Commerce Commission could relax its procedural rules to admit statements by the Department of Defense even if the statement did

not meet all the requirements of the agency's procedural rules.

B. The Decision below also conflicts in principle with decisions of this court which hold that an administrative agency should make findings adequate to enable the court to determine whether the decision comports with congressional policy.

In *A. L. Mechling Barge Lines, Inc.* v. *U.S.*, 376 U.S. 375 (1964) the court held:

> "We have concluded that there is error in the holding in two respects: . . . (2) the Commission erred in failing to specifically consider and pass upon the question of whether the rates violated the National Transportation Policy . . ."

To the same effect is *Shaffer Transportation Co.* v. *U.S.*, 355 U.S. 83 (1957).

C. The decision below also conflicts in result with decisions in other circuits holding that the administrative agency should explain its failure to apply to subsequent applicants' standards applied in earlier decisions.

Petitioners established at the hearings in the proceeding that the traffic, particularly the cargo traffic, and the military traffic available at Texarkana exceeded the amount available to other cities to which the Board had authorized additional air service (Exh. TXK 12, 13 and Petition to the Board for reconsideration, JA 283-296). The Board neither distinguished its prior rulings nor stated that it was changing its standards for authorizing additional air transport service. The court below by not remanding did not require findings on the issue, contrary to the holdings in other circuit courts.

The Court of Appeals for the Second Circuit held in *ABC Air Freight* v. *C.A.B.*, 391 F.2d 295, 302 (1968): "If the Board changes its view as to what tests should be applied, it should announce the change of mind and the reasons supporting the change". The First Circuit also reversed the Board for reversing earlier decisions without explanation in *City of Lawrence* v. *C.A.B.*, 343 F. 2d 583, 588 (1965).

This Court should issue a writ of certiorari to take effective action to remedy one of the critical failures of administrative agencies, i.e., "the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them understood . . ."[2]

II. The Decision Below Raises Significant and Recurring Problems Concerning the Role of "National Defense" Considerations in Determinations by Administrative Agencies Which Are Admonished by Congress To Consider the Needs of the "National Defense"

Several administrative agencies are directed by Congress to consider the needs of the national defense. In addition to the Federal Aviation Act of 1958 and the Interstate Commerce Act, as amended, quoted above, the Merchant Marine Act of 1936[3] (14 U.S.C. 1101)

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[2] Henry J. Friendly, *The Federal Administrative Agencies* (1961) pp. 5-6.

[3] Title 1—Declaration of Policy.

Section 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in

and the Federal Communications Act (47 U.S.C. 151)[4] also call for a consideration of the national defense.

What findings, if any, are required of the agency when the national defense issue is raised? What weight should be given to the contentions of the Department of Defense in proceedings before administrative agencies which do not necessarily claim defense expertise?

The Department of Defense appears before regulatory bodies in hundreds of proceedings. Thus, in testimony before Congress in 1969, the Department stated it had currently pending 164 utility-type proceedings

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time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for ship-building and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. (46 U.S.C. 1101)

[4] § 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. (47 U.S.C. 151).

before various Federal and State regulatory bodies including the Civil Aeronautics Board and the Interstate Commerce Commission.[5]

These appearances are made pursuant to official Department of Defense Instructions.[6]

What weight should be given to the Department's evidence and particularly to its opinion on the needs of

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[5] Hearings before the Senate Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 91st Congress, 1st Session on S. 607 (1969), page 1181.

[6] Department of Defense Instruction
Number 4500.17 [cancelling DOD Instruction 4500.17 of August 26, 1958]

Date January 16, 1969

Subject: Proceedings Before Transportation Regulatory Bodies . . .

I. *Purpose and Applicability*

A. This Instruction sets forth policies and responsibilities governing participation in or initiation of proceedings before transportation regulatory bodies within the United States.

B. The provisions of this Instruction apply to all Department of Defense (DoD) components . . .

IV. *Policy* . . .

B. *Operating Authority or Carrier Service.* Participation by DoD in transportation regulatory body proceedings involving the inauguration, expansion, or reduction of operating authority or carrier service will be undertaken only when: . . .

3. The Single Manager concerned (Directives 5160.2, 5160.10 and 5160.53 references (c), (d) and (e)) determines that any one of the following situations exist within their area of responsibility as outlined in V, below: . . .

b. The services of authorized commercial carriers are inadequate to fulfill the needs of the Department of Defense.

the National Defense? Except for the cases cited above few other decisions[7] were found with guidelines as to the right to be given by independent quasi' judicial administrative agencies to the views of the Department of Defense as to the needs of the National Defense. The question should be clarified to provide guidelines for the several agencies involved.

The decision below also raises the recurring problem of what consideration should be given the contention of other public bodies—cities, counties and towns—submitting applications before the Civil Aeronautics Board.

The issues raised by the airlines are dealt with elaborately to assure that the findings are adequate to respond to the issues raised by them. In this case, 70 pages of the Board's decisions and more than 200 pages of the Examiner's recommended decisions were devoted extensively to responding to airline contentions and answering airline replies. But what of the contentions of public agencies such as your petitioners? Are they entitled to consideration of the issues they raise? Public agencies, such as your petitioners, spend substantial public funds to develop the evidence to prove they meet the standards set by the Board when

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[7] Few decisions have discussed the issue. *In Luckenbach S.S. Co., Inc.* v. *U. S.*, 122 F. Supp. 824 (1954), Aff'd. 347 U.S. 984 (1954), and *Columbia Transportation Co.* v. *U. S.*, 167 F. Supp. 5, 20 (E.D. Mich. S.D. 1958), the issue was discussed. In *Luckenbach, supra* at 828, the court, in an opinion written by Augustus N. Hand, held that when the issue was not raised, "an affirmative discussion of national defense" was not necessary. In *Columbia, supra,* the court stated, at p. 19, "were the facts of the case at bar, relevant to national defense, as weighty . . ." As in *Tanzola, supra,* ". . . we might find it difficult to distinguish them from the case now before us".

it has granted additional air service in its prior decisions. Can the Board totally ignore the contentions of public bodies, prepared on the basis of the Board's prior rulings, without making findings on those contentions?

We urge the Court to exercise its supervisory responsibilities and invalidate the orders of the Board here because Texarkana "has not received a plain answer to its charge to discrimination". See *Greensboro-High Point Airport Authority* v. *CAB*, 231 F. 2d 517, 521-2 (D.C. Cir., 1956), in which the court below invalidated an order of the Board, holding that

> "... the fact remains that Greensboro has not received a plain answer to its charge of discrimination ... we think it is entitled to one ..."

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

September 1971

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,232

TEXAS INTERNATIONAL AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

AMERICAN AIRLINES, INC., DELTA AIR LINES, INC.; THE CITIES OF TEXARKANA, TEXAS; TEXARKANA, ARKANSAS; TEXARKANA AIRPORT BOARD; TEXARKANA CHAMBER OF COMMERCE; FRONTIER AIRLINES, INC.; CITY OF LITTLE ROCK, ARKANSAS; LITTLE ROCK MUNICIPAL AIRPORT COMMISSION and LITTLE ROCK CHAMBER OF COMMERCE, *Intervenors*

SOUTHERN AIRWAYS, INC. and BEAUMONT, TEXAS CHAMBER OF COMMERCE, ET AL., *Intervenors*

No. 23,233

TEXAS INTERNATIONAL AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

DELTA AIR LINES, INC.; SOUTHERN AIRWAYS, INC.; CITIES OF TEXARKANA, TEXAS and TEXARKANA, ARKANSAS; TEXARKANA AIRPORT BOARD; TEXARKANA CHAMBER OF COMMERCE; CITY OF JONESBORO, ARKANSAS; JONESBORO CHAMBER OF COMMERCE; CITY OF HOT SPRINGS, ARKANSAS; HOT SPRINGS CHAMBER OF COMMERCE; FRONTIER AIR LINES; and CITY OF LITTLE ROCK, ET AL., *Intervenors*

Nos. 23,481-2

THE CITIES OF TEXARFANA, TEXAS and TEXARKANA, ARKANSAS, ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

DELTA AIR LINES, and SOUTHERN AIRWAYS, INC., *Intervenors*

Petitions for Review of Orders of the Civil Aeronautics Board

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Decided April 30, 1971

Mr. James M. Verner, with whom *Messrs. Ronald B. Natalie,* and *William C. Evans* were on the brief, for petitioner in Nos. 23,232 and 23,233.

Mr. Paul Reiber, with whom *Mr. Julius Schlezinger* was on the brief, for petitioners in Nos. 23,481 and 23,482.

Mr. Frederick D. Houghteling, Attorney, Civil Aeronautics Board, with whom *Messrs. Joseph B. Goldman,* General Counsel, Civil Aeronautics Board at the time the brief was filed, *O. D. Ozment,* Deputy General Counsel, *Warren L. Sharfman,* Associate General Counsel Litigation and Research, *Robert L. Toomey* and *James E. Keough,* Attorneys, Civil Aeronautics Board, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondent. *Mr. R. Tenney Johnson,* General Counsel, Civil Aeronautics Board, also entered an appearance for respondent in No. 23,482.

Mr. J. William Doolittle, with whom *Mr. Alfred V. J. Prather* was on the brief, for intervenor, American Airlines, Inc., in No. 23,232.

Mr. Robert J. Corber, with whom *Mr. Richard A. Fitzgerald* was on the brief, for intervenor, Frontier Airlines, Inc., in Nos. 23,232 and 23,233.

Mr. Cecil A. Beasley, Jr., with whom *Messrs. John Law Elliott* and *John C. Smuck* were on the brief, for intervenor, Southern Airways, Inc.

Mr. Maurice D. Dyer was on the brief for intervenors, City of Little Rock, Arkansas; Little Rock Municipal Airport Commission and Little Rock Chamber of Commerce.

Mr. Richard H. Wootton was on the brief for intervenors, City of Hot Springs, Arkansas, and the Hot Springs Chamber of Commerce in No. 23,233.

Messrs. Robert Reed Gray, R. S. Maurer and *James W. Cullison* entered appearances for intervenor, Delta Air Lines, in Nos. 23,232, and 23,233.

Before: WILBUR K. MILLER, *Senior Circuit Judge*, ROBB, *Circuit Judge*, and DAVIS,* *Judge*, United States Court of Claims.

PER CURIAM: These cases are consolidated petitions under 49 U.S.C. § 1486 (1964), to review decisions of the Civil Aeronautics Board in two new route cases known as Central Airlines, Inc., Route 81 Investigation (Central 81 case) and the Gulf States-Midwest Points Investigation (Gulf States). The petitioners are Texas International Airlines[1] (Texas International) and the cities of Texarkana (Texas and Arkansas), the Texarkana Airport Board and the Texarkana Chamber of Commerce, collectively referred to as Texarkana. Intervenors include Southern

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* Sitting by designation pursuant to Title 28 U.S. Code, Section 293(a).

[1] Until September, 1968, this carrier's name was Trans-Texas Airways.

Airways, Inc., Frontier Airlines, Inc.,[2] American Airlines, Inc., and the cities of Little Rock, Hot Springs and Beaumont. Texas International's petition in No. 23,232 relates to the *Gulf States* decision, and its petition in No. 23,233, to the *Central 81* decision. Texarkana's petition in No. 23,481 challenges the *Central 81* decision and its petition in No. 23,482 challenges the *Gulf States* decision. Little Rock, Hot Springs and Beaumont complain of the Board's failure to grant them certain improved service.

The large number of routes and proposed routes considered by the Board in its proceedings, and the multitude of parties and intervenors who participated, produced a record of unusual length and complexity. The joint appendix distilled from the record by the parties and filed in this court consists of 671 pages. There are 359 pages of briefs. After studying all of this material we have concluded that the statement of the case in the Board's brief presents a fair summary of the proceedings before the Board and of the pertinent facts; accordingly, we shall follow this summary in our statement of the cases.

I.

The *Central 81* case was designed primarily to examine local service needs in the southwest, and granting the applications of Texas International in that case would, in connection with the carrier's existing route structure, have permitted service between Houston and St. Louis via Memphis and intermediate points other than Memphis.

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[2] As of September 1, 1967, Central Airlines, Inc., was merged with Frontier Airlines, Inc. Other intervenors are Delta Air Lines, Inc., and Southern Airways, Inc. Also intervening were the city of Little Rock, Arkansas, the Little Rock Chamber of Commerce, the city and Chamber of Commerce of Jonesboro, Arkansas; the city and Chamber of Commerce of Hot Springs, Arkansas; and the Beaumont, Texas Chamber of Commerce, the Port Arthur, Texas Chamber of Commerce, and the Commissioners Court of Jefferson County, Texas.

The *Gulf States* case was designed to examine long haul service needs, and the Texas International applications in that case likewise were for service between Houston and St. Louis either directly or via Memphis as well as service from New Orleans via Memphis to St. Louis and Chicago and between any combination of these points.

Texas International here challenges the Board's actions insofar as they denied its applications and granted American Airlines (American) a Houston-St. Louis route and Southern Airways (Southern) routes between Memphis-St. Louis and Memphis-Chicago. Texarkana's complaints are the same in both cases, namely, that the Board should have authorized Texarkana-St. Louis service in addition to other services to Texarkana which were authorized.

The Central 81 Case

The *Central 81* case was instituted by the Board in May 1965 (Order E-22227) for the purpose of restructuring Central Airlines' Route 81 in an effort to eliminate uneconomic segments and points, and to realign the route so as to give the carrier access to a greater volume of traffic, reduce subsidy, and provide more convenient service to the traveling public.[3] As a result of various orders expanding the issues, the proceeding was converted into a vehicle for "reappraisal of much of the local service needs in the southwest area".

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[3] A local service carrier, Central's route system was concentrated largely in the southwestern area of the country. At the time the proceeding was instituted, it was by almost every economic index the weakest of the nation's local service carriers and its subsidy requirements had been continually and substantially increasing (Order E-22227). The proceeding was instituted at the carrier's own petition. During the pendency of the proceeding Central was merged into Frontier Airlines, one of the nation's largest local service carriers. *Frontier-Central Merger,* Docket 18517, Order E-25626 (September 1, 1967).

The issue pertinent to this case was whether the public convenience and necessity required additional service between Memphis and St. Louis, a market in which Delta Airlines was then the only carrier, and, if so, who should provide it. When the Board converted the case into a local service area proceeding, it consolidated several applications by Texas International for new authority (Order E-23158). Grant of these applications would have made possible not only Memphis-St. Louis service by Texas International, but, by reason of Texas International's existing authority, nonstop and one-stop service between Houston and St. Louis, either via Memphis or via other gateways by-passing Memphis,[4] and between New Orleans and St. Louis, via Little Rock or Jonesboro.[5]

Southern sought consolidation in this case of several applications relating to Memphis-St. Louis service. The first (Docket 17142), extending its existing New Orleans-Memphis segments would have made possible a one-stop St. Louis-New Orleans service. The second docket (17141) seeking a new segment between Memphis and St. Louis

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[4] The other gateways were Little Rock or Jonesboro. Texas International could also have operated nonstop between Houston and St. Louis, as well as between San Antonio and St. Louis, and Dallas and St. Louis. By a subsequent order (E-23935), the Board imposed a pretrial restriction under which any service authorized in these three markets would be required to make one intermediate stop.

[5] Texas International's certificate contained a restriction requiring three intermediate stops on flights between New Orleans and Memphis. As a result, any service between New Orleans and St. Louis operated *via Memphis* would have involved four intermediate stops. However, by by-passing Memphis, and utilizing instead Little Rock or Jonesboro as the gateway to St. Louis, a one-stop New Orleans-St. Louis service would have been possible. Indeed, all three gateways could have been overflown and a nonstop New Orleans-St. Louis service provided.

would have made possible a two-stop service.[6] By order E-23686, the Board denied consolidation of the first of Southern's applications on the ground that it did not desire to consider additional usable St. Louis-New Orleans service in this proceeding; however, the Board consolidated Southern's second application, to permit two-stop St. Louis-New Orleans service. In the same order, the Board put Texas International on an equal footing with Southern by imposing a pretrial restriction, requiring Texas International to make two intermediate stops on any St. Louis-New Orleans service it might operate under a grant of its previously consolidated applications.

Also consolidated into the *Central 81* case was a petition by Texarkana for local airline service over a number of routings (Docket 16366). Among the routes sought by Texarkana were (1) Texarkana-Houston via Shreveport; (2) Texarkana-New Orleans via Shreveport; and Texarkana-St. Louis via several alternate routings including a Hot Springs, Little Rock, Jonesboro routing.[7]

After evidentiary hearings, the examiner issued his initial decision in the *Central 81* case on April 12, 1968. With respect to Memphis-St. Louis authority, he found that additional service between these points was required and that a local service carrier should be selected because

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[6] Southern was at that time authorized to operate a one-stop service between Memphis and New Orleans. If the segment were extended to St. Louis, it could overfly Memphis and thus provide one-stop (or even nonstop) St. Louis-New Orleans service. In contrast if Memphis-St. Louis authority were granted in the form of a separate segment, a St. Louis-New Orleans flight would be required to stop at the junction point of the two segments—Memphis—and also, because of the existing one-stop restriction, at one intermediate point between Memphis and New Orleans.

[7] At the time Texas International held authority to serve both Texarkana and Shreveport, but each city lay on different segments and, though they are separated by only 72 miles, direct service between them was not authorized.

of the reduction in subsidy need which the service would be likely to produce. (Initial Decision (I.D.) pp. 21-22). In selecting among the local service applicants, the examiner stated that he was unable to evaluate Texas International's application for operations over this segment since it had failed to submit plans or estimates for a St. Louis extension from Memphis only; rather, its proposal consisted of an integrated package of plans, revenues, cost, etc., for a Houston-St. Louis service not only via Memphis but also via Little Rock and Jonesboro. Consequently, the examiner denied Texas International's application for this single segment. Considering that segment alone the examiner found that Ozark rather than Southern should be selected.[8] His choice was based upon findings that Ozark's operation of the route would produce an operating profit of $471,000 and a subsidy need reduction of $202,000 (as opposed to an operating profit of $397,000 for Southern, and a subsidy need reduction of $69,000), and that Ozark would provide greater benefits in terms of new single-plane service (I.D., p. 23).[9]

Turning to Texas International's applications for new Houston services, the examiner rejected them. He found that Texas International could operate the route "at a profit of $140,000" if it were the only carrier to obtain

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[8] Frontier Airlines had been eliminated for reasons not here pertinent.

[9] The local service carriers' operations are supported by federal subsidy which is designed not only to cover actual operating costs but also to insure that they earn an appropriate return on investment and taxes thereon. Sometimes operation of a given route will produce an *operating* profit, but not enough to produce the appropriate return. In such cases, operation of the route is said to increase the subsidy need. In other cases, the operation of a given route will result in an operating profit which exceeds the appropriate return on investment devoted to that particular operation. The excess is thus available to reduce the amount of subsidy necessary to support the carrier's system-wide operations, and is usually referred to as a reduction in subsidy need.

the Memphis-St. Louis segment, but that it would be a loss operation with Ozark operating a nonstop service in the latter market as he recommended (I.D., p. 29).[10] Moreover, he found, the subsidy need reduction which Ozark would achieve from a Memphis-St. Louis award was substantially greater than Texas International would achieve under its proposal for the St. Louis-Houston route. He found also that Texas International's proposals would divert substantial revenues from Frontier in the Hot Springs-St. Louis market and that its extension to St. Louis would not provide substantial public benefits to beyond-segment traffic, i.e., beyond Memphis-St. Louis.[11] In addition he found that there was no need for additional service between Little Rock and St. Louis, which received nonstop service by Delta (I.D., p. 25).

Coming to Texarkana's application for direct service to St. Louis, Houston, New Orleans, Tulsa, Oklahoma City, and Kansas City, the examiner recognized Texarkana's contention that the inconvenient service it received was responsible for the cities' poor traffic-generating showing.[12]

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[10] Texas International is correct in stating that the term "profit" is more accurately to be referred to as a decrease in subsidy need. See Texas International's brief, p. 35, n. 1, and note 9, *supra*.

[11] In this connection, he noted that Houston-St. Louis received nonstop service from Delta, which was supplemented by connecting service throughout the day. He also found that San Antonio (which was an intermediate point on segment 3, one of the three segments which Texas International sought to have extended from Memphis to St. Louis) had frequent connecting service to St. Louis and hence that Texas International's multi-stop San Antonio-St. Louis proposals offered no important benefits.

[12] To illustrate, Texarkana's traffic to Houston in 1966 was 710, and to New Orleans 160 (I.D., App. 19). As the examiner pointed out, Texarkana had formerly received service to New Orleans, Tulsa, and Kansas City via Braniff, but the authority was terminated in 1963 when the city was generating only three passengers per day on a daily round trip (I.D., p. 30).

Nevertheless it was the examiner's judgment that there was an insufficient traffic potential to support all of the service requested without a substantial increase in subsidy, and that the subsidy which would be required could not be justified by the amount of traffic to be benefited (I.D., p. 30). Nevertheless, he found that Texarkana's air services could be greatly improved at little cost by closing the Texarkana-Shreveport gap and authorizing a Shreveport-Houston segment, and he so recommended.

The Board granted limited discretionary review of the examiner's initial decision (Order 68-8-96). The issue pertinent to this case which the Board reviewed was the selection of a carrier for the Memphis-St. Louis route.

The Gulf States Case

Several months after the scope of the *Central 81* case had been esablished, the Board instituted the *Gulf States* case (Order E-24202, as amended by Order E-24882). The purpose of that investigation was to consider whether the public convenience and necessity required additional or first nonstop or one-stop service in ten important markets, including Houston-St. Louis, Memphis-Chicago, New Orleans-Memphis and New Orleans-Chicago.[13] The Board stated that it would consider inclusion of intermediate points on any of the segments at issue, provided only that any flight operated pursuant to an award in the case must serve both terminals and no more than one intermediate point between the terminals (Orders E-24882, E-25180). However, the Board also specified that a single flight could serve more than one primary market.

Dozens of applications were consolidated for consideration in the case. Among these were applications by Texas International for (1) the Chicago-New Orleans segment,

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[13] The other six markets were Dallas/Ft. Worth-Kansas City; Dallas/Ft. Worth-Detroit; San Antonio-Chicago; San Antonio-Detroit; and Nashville-Chicago.

with St. Louis as an intermediate point; (2) Chicago-Memphis, with St. Louis as an intermediate; and (3) New Orleans-Memphis. In addition, a petition by Texarkana was consolidated, requesting, among other things, direct service to St. Louis.

A little more than three months after issuance of the initial decision in the *Central 81* case and just prior to the Board's grant of limited rview of that decision, the examiner issued his initial decision in the *Gulf States* case. Only pertinent portions are discussed here.

After a detailed review of traffic, service, and economic characteristics of the Chicago-New Orleans market (I.D., pp. 5-7, 47-49, App. B., pp. 7-8), the examiner concluded that this market needed additional service (I.D., p. 48). Upon consideration of possible intermediate points,[14] he found that St. Louis should be named as an intermediate point on the route because of the need for additional servic between that point and New Orleans (I.D., pp. 49-50).[15] He concluded that Eastern should receive a Chicago-New Orleans segment via St. Louis.[16]

Although he found that the Chicago-Memphis market required additional service, the examiner concluded that no intermediate points should be included on the route.

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[14] The examiner found four points that would benefit the route and benefit from the route. Texarkana was one of the intermediate points proposed. However, a terminal-to-terminal routing via that point would have resulted in 21.4 percent circuity which the examiner found would be ineffectual in attracting primary market traffic (I.D., p. 7).

[15] As previously indicated, Texas International, among others, proposed St. Louis as an intermediate.

[16] With respect to the local service carriers, including Texas International, the examiner found it "highly improbable" that they could mount a full pattern of competitive service without incurring operating losses and resultant increases in subsidy need (I.D., p. 57).

Southern was selected to operate the route. In the final analysis, the examiner's choice rested upon beyond benefits and subsidy need reduction. Looking solely at the local traffic, he found that none of the local service carriers could achieve significant subsidy need reduction (I.D., p. 70). However, he found that each could to some extent rely upon back-up traffic support, which should produce enough additional revenue to produce subsidy reduction (I.D., pp. 71-72). Of the four local service carriers, Southern was found to have the most significant back-up potential and to "offer the best possibility for subsidy reduction." (I.D., p. 73, A. 455). Moreover, the examiner emphasized that of the local carrier applicants, Southern had the greatest need for route strengthening and subsidy reduction, since it derived a higher percentage of its revenue from subsidy than any of the others.[17]

Southern was also picked by the examiner to operate the New Orleans-Memphis route. He based this selection on Southern's historic participation in the traffic over the route, the adverse impact on its revenues and normal development if the award were made to another carrier, and the back-up it would give to the Memphis-Chicago service being awarded to Southern. The examiner found that the facts did not favor the selection of Texas International, and Texas International abandoned its application when the case reached the Board for review.

Having first concluded that the Houston-St. Louis market required new service, the examiner considered the question of intermediate points. Among those found to be within acceptable circuity limitations were Memphis, Shreveport, Little Rock, Texarkana, and Beaumont/Port Arthur (I.D., p. 44). Texarkana and Beaumont/Port

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[17] For the fiscal year ended June 30, 1967, subsidy accounted for 19.3 percent of Southern's total revenues, as opposed to 14.1 percent and 15.9 percent for Ozark and Texas International, respectively (I.D., p. 73).

Arthur, the examiner found, "obviously lack the traffic potential to support a stop . . ."; and he found that Little Rock's "Houston potential falls considerably short of requiring and supporting a competitive nonstop service." (I.D., p. 115).[18] The examiner eliminated the others because they already had sufficient service to the terminals or had been recommended for additional service in the *Central 81* case. Accordingly, the examiner found that the Houston-St. Louis segment should include no intermediate points (I.D., p. 116).

In making his carrier selection, the examiner noted that the local service carriers had all estimated a subsidy need reduction, but that this had been predicated upon the carriage of many intermediate market passengers (I.D., p. 116). In view of his determination not to include any intermediate points, the examiner found that the local service carriers' forecasts "have no validity" and he concluded that all of them would incur an increase in subsidy need if they operated the route on a nonstop basis (I.D., p. 117, and App. E, p. 6).

The examiner recognized that Texas International (and Ozark) would have some backup support. Texas International's backup support, however, was largely dependent upon San Antonio-St. Louis traffic which at the time had no single-carrier service; but the examiner had already determined to include St. Louis as an intermediate in the San Antonio-Chicago market, thereby making possible nonstop San Antonio-St. Louis service, and he had awarded that route to American. Accordingly, it was his judgment that a one-stop service by Texas International via Houston would not capture sufficient traffic to alter materially his estimates relating to the subsidy implications of the Houston-St. Louis route. Ultimately, the examiner nar-

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[18] 1966 traffic between Texarkana and St. Louis was 390 and 710 between Texarkana and Houston. The comparable figures for Beaumont/Port Arthur were 800 and 33,720, respectively.

rowed the choice to TWA and American and selected TWA because of its superior beyond segment benefits.

On August 14, 1968 (4 days before grant of limited discretionary review in the *Central 81* case), the Board *sua sponte* ordered discretionary review of the initial decision in the *Gulf States* case (Order 68-8-62).

The Board's Decisions

On May 7, 1969, the Board issued its decision in the *Gulf States* case (Order 69-5-25), and on September 3, 1969, it issued a further opinion and order on reconsideration (Order 69-9-18). Taken together, the decisions made a number of changes in the initial decision of the examiner, which the Board otherwise adopted. The result pertinent to this case was that the Board (1) changed the New Orleans-Chicago award to Eastern by eliminating St. Louis as an intermediate point; (2) selected American rather than TWA for the Houston-St. Louis award; and (3) affirmed the Chicago-Memphis award to Southern on reconsideration although it had given the route to Eastern in its original decision.

The Board disagreed with the examiner as to the intermediate points to be included in the Chicago-New Orleans route awarded to Eastern. Among other things, it concluded that St. Louis should not be named as an intermediate point. It pointed out in this connection that after the initial decision had been issued, Ozark had been awarded Chicago-St. Louis nonstop authority in another proceeding. Thus, including St. Louis in the Chicago-New Orleans award to Eastern would have placed a fourth carrier in the Chicago-St. Louis market. "Not only," the Board said, "is this market not ready for a fourth nonstop carrier, but we are not inclined to make such an award on top of our recent subsidy-ineligible grant of nonstop authority to Ozark in this market" (Order 69-5-25, p. 9).

The Board's selection of American instead of TWA in the Houston-St. Louis market need not be reviewed. It suffices to say that the Board found "that none of the local service carriers should be selected for this route because it is improbable that any of them could achieve a subsidy reduction and because of the limited beyond benefits they could offer." (Order 69-5-25, p. 31, n. 49).

In affirming the examiner's selection of Southern for the Memphis-Chicago route, thus reversing its own earlier determination, the Board relied on such factors as changed equipment conditions affecting the costing of flights south of Memphis, fare increases, a revised judgment as to the carrier's ability to penetrate the market, and adjustments to revenues to reflect on-line connecting traffic to points south of Memphis not proposed for single-plane service, which had not been included in earlier estimates. The Board concluded (Order 69-9-18, p. 8):

> "that Southern will indeed be able to comptte effectively with Delta in the Chicago-Memphis market, and that the award will materially strengthen the carrier and contribute to reducing its dependence on federal subsidy. Since it now appears that Southern can operate its schedule proposal profitably, it becomes in order to point out that Southern's proposal offers considerably greater public benefits than Eastern's, in terms both of schedules operated in the local market and of beyond-segment passengers benefited. Thus, the balance of the relevant factors now weighs in favor of an award to Southern rather than Eastern."

At the same time the Board denied Texas International's petition for reconsideration with respect to this route on the grounds that its beyond-segment traffic potential was less than Southern's, its need for strengthening was less, and its service proposals did not outweigh the factors favoring selection of Southern. (I.D., p. 9).

The day following decision of the *Gulf States* case, the Board decided the *Central 81* case (Order 69-5-30).[19] Only its disposition of the carrier selection issue in the Memphis-St. Louis market is relevant here. The Board selected Southern for the route award instead of Ozark, which had been selected by the examiner.

Since the examiner had narrowed the choice to Southern and Ozark, the Board first took up those two carriers, and concluded that Southern should be preferred over Ozark. Although the examiner had found Ozark superior in terms of traffic which would receive single-plane service, based on 1966 traffic data, the Board found that a fairer test would be the number of passengers who would receive such service in the forecast year, 1968. On this basis, the examiner's figures showed that Ozark's margin shrank to 558 passengers, a figure devoid of decisional significance in the Board's judgment (Order 69-5-30, p. 4). Conversely, the Board said, the examiner's figures showed Southern serving the convenience of a substantially greater number of beyond-segment passengers than Ozark in all markets. The Board also pointed out that because Southern could tack the Memphis-New Orleans authority which it had received in the *Gulf States* case with the Memphis-St. Louis segment, Southern's ability to serve the convenience of beyond traffic would be further enhanced, since it could thereby provide one-stop St. Louis-New Orleans service (I.D., p. 4).[20]

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[19] Petitions for reconsideration were filed in this case, but the Board found no showing of error or new matter warranting a change in its decision (Order 69-7-170).

[20] The Board emphasized that its refusal to place St. Louis on the Chicago-New Orleans segment in the *Gulf States* case had in no way derogated from the examiner's finding in that case, adopted by the Board, that there was a need for additional St. Louis-New Orleans service. Rather, the Board said, that determination had rested upon special circumstances, *i.e.*, the recent award of Chicago-St. Louis authority in another case.

The Board also found that both Ozark and Southern could achieve significant subsidy need reductions from the Memphis-St. Louis award. By making unchallenged adjustments to the examiner's finding of a $69,000 reduction for Southern, the Board estimated that Southern's reduction would be in the neighborhood of $172,000 without taking into account the benefits of the St. Louis-New Orleans service. The result, the Board said, was so close to the various estimates for Ozark that the difference was not sufficient to outweigh the other factors favoring Southern over Ozark. Chief among these factors in addition to beyond benefits, was Southern's greater need for strengthening.[21] Finally, the Board concluded that "St. Louis will be a far stronger anchor for the northwest corner of Southern's system than Memphis, whereas the addition of Memphis to Ozark's system would not result in comparable structural strengthening." (Order 69-5-30, p. 6).

Having decided that Southern should be preferred over Ozark, the Board then turned to a comparison of Southern and Texas International and Frontier. The Board found it "clear" that the latter two could not achieve a subsidy need reduction comparable to Southern (or Ozark) since their claimed beyond-segment benefits were of little significance: "As these carriers could bring relatively little improved service to beyond-segment markets, so they could achieve relatively little back-up support for prime-market service." (Order 69-30, pp. 7-8).

II.

In the *Central 81* case Texas International filed an application to operate nonstop and one-stop service between New Orleans and St. Louis. Southern likewise applied for au-

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[21] Southern's total revenues, the Board found, were considerably less than Ozark's, and its dependence on subsidy much greater. In fiscal 1968, subsidy accounted for 15.5 percent of Southern's revenues, as opposed to 9.3 percent for Ozark.

thority to operate one-stop service between New Orleans and St. Louis. Texas International's aplication was consolidated in the *Central 81* case but the Board refused to consolidate Southern's application. The ground of the Board's refusal was that consideration of nonstop and one-stop service between New Orleans and St. Louis would unduly expand the proceeding. The Board did agree to consider an application by Southern which would permit two-stop St. Louis-New Orleans service; and in order to put Texas International on an equal footing with Southern, the Board imposed a pretrial restriction which required Texas International to make two stops otn any St. Louis-New Orleans service which it might be authorized to operate.[22]

As we have said, Southern received Memphis-New Orleans nonstop authority in the *Gulf States* case; and in the *Central 81* case Southern was awarded Memphis-St. Louis authority. The examiner had selected Ozark for the Mem-

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[22] The Board's order in this respect was as follows:

"Southern's application, docket 17142, involves the extension of Southern's existing segments 3 and 4 beyond Memphis to St. Louis. The grant of that application would authorize a one-stop St. Louis-New Orleans service with relatively little circuity. Although Central is an applicant for one-stop St. Louis-New Orleans authority, the routing is so circuitous that the service would not be usable. Under these circumstances, we find no justification for consolidating Southern's application.[4]

"[4] We note in this same connection that Trans-Texas' proposals for St. Louis-New Orleans nonstop authority have been consolidated. As indicated above, we find no warrant for considering in this proceeding the question of additional usable service in this market and we find that consideration of this Trans-Texas proposal would unduly expand the proceeding and unnecessarily delay its disposition. We have decided, therefore, to impose a pretrial restriction which would require Trans-Texas to make two stops in the St. Louis-New Orleans market in the event such an award is made to that carrier. The effect of our action herein will be to insure equal treatment for all carriers concerned." (Order No. E-23686, p. 4)

phis-St. Louis route. The Board, however, concluded that the public convenience and necessity required that Southern be selected instead of Ozark. In comparing Southern with Ozark in the *Central 81* case the Board said (Order 69-5-30, pp. 3-5, footnotes omitted):

> "We find that Southern would offer somewhat superior service benefits, and that, even though Ozark might achieve a slightly greater subsidy need reduction than Southern, an award in this market offers a more significant opportunity for strengthening Southern than it does for Ozark.
>
> "The examiner showed Ozark as affording first single-plane service to more than twice as many passengers as Southern (9,945 vs. 4,510), based on 1966 traffic data. We agree with Southern, however, that a fairer test is the number of passengers who will be afforded first single-plane service in the forecast year (here 1968). On this basis, and counting only those passengers who would actually use the carrier's service, Ozark's advantage over Southern shrinks to a mere 558 passengers (12,909 vs. 12,251)—a margin devoid of decisional significance since it is obviously less than the probable error in the forecasts.
>
> "On the other hand, the examiner's figures show Southern conveniencing a substantially greater number of beyond-segment pasengers in all markets than Ozark (30,523 vs. 18,105). Moreover, recent route awards have enhanced Southern's ability to offer significant beyond-segment service benefits more than they have Ozark's. In particular, Southern's recent award of Memphis-New Orleans nonstop authority in the *Gulf States-Midwest Points Service Investigation*, Order 69-5-25, May 7, 1969, opens up the possibility of one-stop service in the St. Louis-New Orleans market. The examiner in *Gulf States* forecast 60,000 passengers in this market by 1969, and found that

'competition is needed as a spur to improve existing services which are something less than attractive.' Gulf States, I.D., p. 50)

"While we did not follow the examiner's recommendation in *Gulf States* to include St. Louis as an intermediate point on a new Chicago-New Orleans segment, for reasons explained in our decision there relating to the St. Louis-Chicago market, we nevertheless did not question his findings with respect to need for additional service in the St. Louis-New Orleans market. With one-stop authority in this market via Memphis, at virtually no circuity, Southern should be able to participate in the traffic to a substantially greater extent than Eastern, and should provide a valuable competitive spur to Delta.

"Ozark does not offer any comparable competitive service benefits."

Texas International contends strenuously that the Board's disposition of its application for New Orleans-St. Louis authority violated the doctrine of *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945). The argument is that although the Board refused to consider the issue of nonstop or one-stop New Orleans-St. Louis service in the *Central 81* case, and the parties proceeded on that basis, nevertheless in the *Central 81* case the Board found that Southern's ability to provide one-stop service via Memphis between New Orleans and St. Louis was a factor favoring the award of the Memphis-St. Louis route to Southern. Texas International concludes that these actions by the Board denied Texas International a comparative consideration of its application for New Orleans-St. Louis authority.

We think the Board did not violate the *Ashbacker* doctrine. In the first place, Texas International's application was denied on grounds unrelated to Southern's ability to combine its Memphis-New Orleans authority with the Memphis-St. Louis grant. Southern's ability to combine

its Memphis-New Orleans authority with the Memphis-St. Louis grant. Southern's ability to combine or "tack" the two authorities was mentioned by the Board only as one factor favoring a grant to Southern rather than to Ozark; it had nothing to do with the denial of Texas International's application. Moreover, in the *Gulf States* case the Board did consider the issue of nonstop or one-stop service between New Orleans and St. Louis, and in that case Texas International proposed nonstop service between these points. Southern proposed both nonstop service and one-stop service via Memphis, and Texas International also applied for Memphis-New Orleans authority. It thus appears that Texas International's proposals for New Orleans-St. Louis service were comparatively considered in the *Gulf States* case.

Southern's ability to combine its two grants did not result in unfairness to Texas International. Such tacking is not a new device. *See Frontier Airlines, Inc.* v. *CAB*, 104 U.S. App. D.C. 78, 259 F.2d 808 (1958). Had Texas International received New Orleans-Memphis authority in the *Gulf States* case it too might have relied upon this authority as a ground for its selection in the *Central 81* case.

In support of its argument that it was denied a comparative hearing Texas International relies upon *Delta Airlines, Inc.* v. *CAB*, 107 U.S. App. D.C. 174, 275 F.2d 632 (1959), *cert. denied*, 362 U.S. 969 (1960). We think that case must be distinguished on the facts, for there the Board excluded from consideration in one proceeding issues that remained pending unheard in another proceeding, and the Board in the first proceeding made an award which in effect determined those unheard issues. Here no proposals were unheard; on the contrary all of the issues were litigated.

In general, the other attacks on the Board's orders by the complaining parties are based upon challenges to the judgment and computations of the Board and the exam-

iners with respect to such matters as beyond-segment revenues and service, costs, the posibility of subsidy need reduction, convenience to passengers, route patterns, and the public interest. In reviewing these contentions we are mindful of our limited function. The selection of operators for new air routes is a task for administrative judgment. *United Air Lines, Inc.* v. *CAB*, 81 U.S. App. D.C. 89, 155 F.2d 169 (1946). The selection cannot be made by the application of a mathematical formula; the Board in the exercise of its judgment must consider and evaluate all pertinent factors. *North Central Airlines, Inc.* v. *CAB*, 105 U.S. App. D.C. 207, 265, F.2d 581, *cert. denied*, 360 U.S. 903 (1959); *Braniff Airways, Inc.* v. *CAB*, 126 U.S. App. D.C. 399, 379 F.2d 453 (1967). The Board's findings of fact, if supported by substantial evidence, are conclusive on us. 49 U.S.C. § 1486(e). If examination of the entire record discloses that the Board's findings are supported by substantial evidence and that its conclusions flow rationally from such findings, it is not for us to substitute our judgment for the judgment of the Board. *Lake Central Airlines, Inc.* v. *CAB*, 99 U.S. App. D.C. 226, 239 F.2d 46 (1956); *Frontier Airlines, Inc.* v. *CAB*, 104 U.S. App. D.C. 78, 259 F.2d 808 (1958); *Braniff Airways, Inc.* v. *CAB*, 126 U.S. App. D.C. 397, 379 F.2d 453 (1967). Evaluation of the uncertainties and imponderables implicit in economic and competitive factors is a task for the Board, not for this court. *United Air Lines, Inc.* v. *CAB*, 81 U.S. App. D.C. 89, 155 F.2d 169 (1946).

Considering the record in the light of these principles we are satisfied that the Board's findings are supported by substantial evidence and that its resulting conclusions are rational. Recapitulation of the complex details of the evidence would serve no useful purpose and would make this opinion intolerably long; it is enough to say that we cannot find that the Board's conclusions were in any respect unreasonable. One matter, however, does not merit further consideration.

Texas International contends that the award of a Memphis-St. Louis route to Southern is in error because in computing the subsidy need reduction that Texas International might achieve the examiner in the *Central 81* case erroneously applied Southern's DC-9 block hour cost to Texas International. According to Texas International if its block hour cost had been used its subsidy need reduction would have been $280,000 rather than $140,000 as found by the examiner, and would have exceeded the subsidy need reductions attributed to both Ozark and Southern. Texas International argues further that although this alleged error was called to the attention of the Board it was perpetuated in the Board's ultimate finding that Texas International could not achieve a subsidy need reduction comparable to those found for Ozark and Southern. We are not persuaded by this argument.

In rejecting Texas International's application for Memphis-St. Louis authority the examiner in the *Central 81* case did not rely upon the factor of subsidy need reduction. Rather, he based his decision upon the ground that Texas International had not submitted plans and estimates for a St. Louis-Memphis extension but for a Houston-St. Louis service with the St. Louis entry via Little Rock, Jonesboro and Memphis. Accordingly, he found (I.D., p. 22):

> "Without specific plans and estimates for the Memphis-St. Louis extension, it is impossible to determine the merits of its Memphis-St. Louis proposal only. Its application for a Memphis-St. Louis extension should be denied."

The examiner's estimate of $140,000 as the subsidy need reduction that might be achieved by Texas International was made with respect to a different proposal, namely, Texas International's proposal for a "St. Louis-Houston route by the extension of its system north from Jonesboro,

Little Rock, and Memphis to St. Louis and south from Texarkana to Houston via Shreveport." (I.D., p. 28).[23]

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[23] The examiner's findings with respect to the St. Louis-Houston proposals were (footnotes omitted):

> "Frontier and Trans-Texas propose St. Louis-Houston routes via Texarkana and Shreveport. For Frontier, this would involve an extension from Fort Smith via Texarkana and Shreveport, and would enable it to provide direct service to Houston from both Kansas City and St. Louis. Trans-Texas proposes a St. Louis-Houston route by the extension of its system north from Jonesboro, Little Rock, and Memphis to St. Louis and south from Texarkana to Houston via Shreveport.
>
> "Each applicant contends that it could operate the route at a profit and that it would reduce its subsidy needs. A revision of Frontier's estimates more realistically reflecting the revenues and expenses involved shows that Frontier would operate this route at a substantial loss.
>
> "Trans-Texas would operate this route at a profit of $140,000 if it were the only applicant to obtain the Memphis-St. Louis segment. This extension would not provide any substantial public benefit. Delta provides nonstop jet service between St. Louis and Houston which is supplemented by connecting services throughout the day. Braniff provides direct Kansas City-Houston service supplemented by frequent connecting schedules. San Antonio has frequent connecting service in each direction to St. Louis. No other substantial Kansas City or St. Louis traffic flow is involved.
>
> "Contrasted with this is the comparative benefits of alternative services. The St. Louis extension for Trans-Texas will be a loss operation with Ozark providing non-stop service between St. Louis and Memphis. Furthermore, it would divert substantial revenues in the Hot Springs-St. Louis market where Frontier carries three-fourths of the traffic, and by establishment of an additional Little Rock-Memphis round trip Trans-Texas would diminish the benefit to Frontier of its Memphis extension. Furthermore, authorization of Ozark to provide the St. Louis-Memphis service will result in a substantially greater reduction in subsidy than would the authorization of Trans-Texas for the St. Louis-Houston route. Under the circumstances, there is no justification for authorizing the proposed St. Louis-Houston route."

The examiner rejected this application. In its order granting discretionary review of the examiner's decision the Board declined to review his denial of Texas International's application for a Houston-St. Louis route via Jonesboro (Order 68-8-96, p. 2, n. 2). Accordingly, as the Board noted in its order denying petitions for reconsideration, that application and the forecasts relating to it were no longer in issue before the Board (Order 69-7-170, p. 2, n.5). Moreover, the Board's finding in its decision that Texas International could not achieve a subsidy need reduction comparable to those found for Ozark and Southern was not based upon a computation of unit DC-9 costs. On the contrary, the Board pointed out that Texas International's case on this issue was based "primarily on claimed beyond-segment service benefits"; and after analyzing this claim the Board found that such benefits were of little significance (Order 69-5-30, pp. 6-7).

Upon consideration of the entire record the orders under review are

Affirmed.

Filed June 2, 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

Nos. 23,481, 23482

THE CITIES OF TEXARKANA, TEXAS and TEXARKANA, ARKANSAS, ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

DELTA AIR LINES, and SOUTHERN AIRWAYS, INC., *Intervenors*

Before: Wilbur K. Miller, Senior Circuit Judge; Robb, Circuit Judge and Davis,* Associate Judge, U. S. Court of Claims.

Order

On consideration of petitioners' petition for rehearing, it is

ORDERED by the Court that petitioners' aforesaid petition is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON
Nathan J. Paulson
Clerk

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* Sitting by designation pursuant to Title 28 U.S. Code Section

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In the Supreme Court of the United States

OCTOBER TERM, 1971

THE CITIES OF TEXARKANA, TEXAS, AND TEXARKANA, ARKANSAS, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-25a) is reported at 444 F. 2d 969. The opinions of the Civil Aeronautics Board are not yet reported.[1]

[1] Petitioners have lodged ten copies of each of the Board's opinions with the Clerk of this Court as an unprinted appendix to their petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971. A petition for rehearing *en banc* was denied on June 2, 1971. On August 27, 1971, Mr. Chief Justice Burger extended the time within which to file a petition for a writ of certiorari to and including September 30, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board's decision not to authorize direct Texarkana-St. Louis air service was supported by adequate findings.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301 *et seq.*) are set forth in the Appendix, *infra.*

STATEMENT

This petition involves a challenge to decisions of the Civil Aeronautics Board in two airline route proceedings known as *Central Airlines, Inc., Route 81 Investigation* (*"Central Route 81"*) and *Gulf States-Midwest Points Investigation* (*"Gulf States"*).

1. In May 1965, the Civil Aeronautics Board instituted the *Central Route 81* case, which, as ultimately

structured, became "a vehicle for 'reappraisal of much of the local service needs in the southwest area' " of the United States (Pet. App. 5a). Applications for new or amended route authority filed by six airlines were consolidated into the proceeding. Also consolidated were petitions by a number of cities for new or improved service, including the petitions by the twin cities of Texarkana, Texas and Arkansas ("Texarkana"), which sought service to Houston, New Orleans, St. Louis, Tulsa, Oklahoma City and Kansas City via various intermediate points.

Following evidentiary hearings, the examiner issued his initial decision on April 12, 1968. He found that Texarkana had a very poor traffic-generating history (Pet. App. 9a, n. 12), and, while conceding that "to some extent" this might be attributable to inconvenient service, he concluded that there was an insufficient traffic potential to support most of Texarkana's requests without a significant increase in federal subsidy. Such an expenditure, in his opinion, would be out of proportion to the public benefits. See Pet. App. 8a, n. 9. Texarkana's request for direct service to Houston and New Orleans, however, should be granted, the examiner concluded. He found that Texas International Airlines could provide the service without subsidy and that this would greatly improve the cities' air services. On limited discretionary review,

the Board sustained the examiner's decision with respect to Texarkana.[2]

2. The *Gulf States* route proceeding was instituted shortly after the scope of *Central 81* had been fixed; its purpose was to consider authorization of new or competitive service in ten important longhaul markets, including Houston-St. Louis (Pet. App. 10a). While possible intermediate points on any of the segments at issue would be considered, the focus of the proceeding was to be on the needs of the ten "prime" markets, and, to this end, the Board provided at the outset that any flight operated pursuant to an award could serve but one intermediate point between terminals. Thirty-three applications by 14 carriers and 11 cities were consolidated for hearing, including one

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[2] Texarkana service was only tangentially involved in the Board's decision. The principal issue on review was selection of a carrier to provide additional nonstop Memphis-St. Louis service, which the examiner had found required by the public convenience and necessity, and for which he had selected Ozark Air Lines. Texas International was an applicant for Memphis-St. Louis authority. Its existing routes include a segment on which both Texarkana and Memphis lie. Thus, were it to be selected to operate from Memphis to St. Louis, Texarkana-St. Louis service by Texas International would have been possible. In its decision on discretionary review, however, the Board narrowed the choice to Ozark and Southern Airways, finding that the benefits either of them would provide outweighed those which would flow from Texas International's selection. This determination was challenged by Texas International in the court below; the Board's determination was sustained, and Texas International has not sought review in this Court.

by Texarkana seeking service to St. Louis and a number of other cities (Pet. App. 11a).

Just prior to the Board's grant of limited discretionary review in *Central 81,* the examiner issued his initial decision in *Gulf States.* Most significant for present purposes was his discussion of the Houston-St. Louis market which, he concluded, required new service. Although he determined that Texarkana and four other points (Memphis, Shreveport, Little Rock, and Beaumont/Port Arthur) were geographically feasible intermediate points on the Houston-St. Louis route, it was his opinion that none of them should be so designated. With respect to Texarkana, he stated that it "obviously lack[s] the traffic potential to support a stop * * *" (Pet. App. 13a).

On discretionary review, granted *sua sponte,* the Board affirmed, adopting the examiner's findings and conclusions. In addition, it observed that inclusion of points such as Texarkana as intermediate points would run counter to the Board's goal of achieving the optimum pattern of express service in the prime market; there was not, in its view, sufficient justification in terms of public benefits from service at the intermediate points to warrant such a result (Order 69–9–18, p. 11).

3. Texas International petitioned the court of appeals for review of various aspects of the Board's orders in both cases, pursuant to 49 U.S.C. 1486. Thereafter, Texarkana filed a similar petition, and

the review proceedings were consolidated. Two other carriers and three cities were permitted to intervene to challenge other facets of the orders.

On April 30, 1971, the court of appeals unanimously affirmed the Board's orders (Pet. App. 25a). It held that "the Board's findings are supported by substantial evidence and that its conclusions flow rationally from such findings * * *" (Pet. App. 22a).

ARGUMENT

Petitioner's challenge here goes only to the adequacy of the Board's findings in the context of a factual situation that is peculiar to these consolidated route cases. The attack on those findings is, as we show below, insubstantial and does not warrant further consideration by this Court.

1. The Board limited its certification of airline service at Texarkana to direct service to Houston and New Orleans because the inclusion of Texarkana as an intermediate stop on the longhaul routes would detract from service in the designated prime markets, and because approval of the cities' requests for other direct service would entail a substantial federal subsidy out of proportion to public benefit. Petitioners do not contest these findings. Instead, they contend that the Board, in reaching its conclusion, failed to deal adequately with evidence and allegations relating to defense transportation needs and the air cargo traffic available at Texarkana. We do not agree.

In *Gulf States,* the examiner reviewed in detail (I.D. App. D, pp. 6–7)[3] all of Texarkana's evidence:

[3] "I.D." refers to the Initial Decision of the Hearing examiner.

the cities' size and economic characteristics; the transportation requirements of their defense-related installations; their past and present air service; their traffic (passenger and freight, civilian and military); and their traffic growth rates. He found that the cities had need for improved airline service, and thus considered Texarkana as a potential intermediate point on the Houston-St. Louis segment. But, as we have already shown, he concluded on balance that Texarkana had insufficient traffic potential to support a stop there on flights designed primarily for meeting the needs of the prime market.[4] The Board adopted these findings and conclusions (Order 69–9–18, pp. 2, 115).

Similarly, in *Central 81* the examiner evaluated Texarkana's needs and recognized, as did the examiner in *Gulf States,* that its traffic history did not give a completely accurate picture of Texarkana's traffic-generating ability. He also concluded, however, that there was insufficient traffic available to support all of the service Texarkana sought without a substantial increase in subsidy, and that the traffic potential was not sufficiently great to warrant the necessary subsidy support. These findings and conclusions of the examiner were adopted by the Board (Order 69–5–30, p. 2, n. 3).

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[4] The record showed that there were 1.1 Texarkana-St. Louis passengers per day in 1966. The daily number of passengers to all points enplaning at Texarkana in 1966 was 46 (on an average of six flights per day). It also showed .29 tons of air freight per day to all points during the same period. In 1965, 1500 tons of freight had been trucked by Texarkana's Red River Ammunition Depot to Dallas for air shipment to points not specified in the record. (I.D., p. 45, I.D. App. D, p. 7).

To be sure, the majority of the Board's findings are contained in the examiner's initial decisions. But these findings were explicitly adopted by the Board on discretionary review after full consideration of petitioner's exceptions to the initial decisions, together with the additional comments and changes made by the Board. Frequently, the Board adopts all or a part of the examiner's findings as its own without repeating or recasting them in its own opinion, a practice which the courts have found proper. *National Air Carrier Association* v. *Civil Aeronautics Board,* 442 F. 2d 862 (C.A. D.C.); *Division 1142, etc.* v. *Labor Board,* 294 F. 2d 264, 268 (C.A. D.C.); *North American Airlines* v. *Civil Aeronautics Board,* 237 F. 2d 209 (C.A. D.C.).

The findings are entirely adequate. The Board is not required to address itself in greater detail to the factors urged in support of more airline service to Texarkana. It considered petitioners' contentions and responded to them with articulate findings and reasons. No more is required of an agency. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173; *WAIT Radio* v. *Federal Communications Commission,* 418 F. 2d 1153 (C.A. D.C.).

Moreover, to require a more detailed articulation by the Board of the various factors relevant to its determination concerning Texarkana would be unrealistic in this case. In *Central 81* there were, in addition to the six carrier applicants and three civic petitioners, 58 parties participating as intervenors (four air carriers, 53 state or civic bodies, and the Depart-

ment of Defense); the mere statement of the issues in conclusory outline consumed a six-page appendix to the initial decision. As previously indicated, 33 applications by 14 carriers and 11 cities were at issue in *Gulf States* and, in addition, there were 21 intervenors actively participating in the case. As the court of appeals noted, "the large number of routes and proposed routes considered by the Board in its proceedings, and the multitude of parties and intervenors who participated, produced a record of unusual length and complexity" (Pet. App. 4a).[5] In fact, these related proceedings involved consideration of airline services throughout a major section of the country. Texarkana service was but one of hundreds of requests which had to be considered.

In these circumstances, the Board could not possibly address itself in detail to every consideration advanced by each of the "multitude of parties" (Pet. App. 4a) in support of its own particular request.[6] From its decision, however, it is abundantly clear that careful attention was given to Texarkana's request and the supporting contentions. Some of the requests were granted; others were denied for reasons which are clearly explicated and which reasonably support the determination.

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[5] "The joint appendix distilled from the record by the parties and filed in [the court of appeals] consists of 671 pages" (Pet. App. 4a). The full record covered some 57 volumes.

[6] As it was, the initial decisions in the two cases combined covered approximately 400 pages.

There are no special requirements for explicating specific findings relating to considerations of national defense needs when that factor is advanced along with many others in support of an application. While the Declaration of Policy, set forth in Section 102 of the Federal Aviation Act (Appendix *infra,* p. 12–13), specifies that the "needs of * * * the national defense" are one facet of the convenience-and-necessity standard, it also specifies others, including those the Board found decisive here—"sound economic conditions in * * * air transportation" and "the needs of the * * * commerce of the United States." Obviously, the significance of any one of the enumerated factors varies from case to case depending on the facts, and so does the need for detailed findings with respect to it. *Outagamie County* v. *Civil Aeronautics Board,* 355 F. 2d 900 (C.A. 7).

The Board's findings, incorporating the findings and conclusions of both examiners, were also adequate to enable the courts to perform their proper reviewing function. "[T]he path it followed can be discerned" and "its findings are [not] so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process." *Colorado Interstate Co.* v. *Comm'n,* 324 U.S. 581, 595.

2. Petitioners also urge (Pet. 10) that the case involves the "recurring problem" of the "weight" that agencies, such as the Board, should give to the views of the Department of Defense. It is well settled, however, that the weight to be given to evidence or testimony of any party is a matter within the sound discretion of the agency; where, as here, the record plain-

ly shows that defense-related considerations were not ignored, it is not a proper function of the reviewing court to reassess the Board's decision on the basis of the court's own evaluation of the "weight" that should have been attributed to certain evidence. Cf. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404.[7]

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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[7] Petitioner's related contention that the Board "totally ignore[d]" its contention (Pet. 12–13) is without support in the record. The various requests and arguments by Texarkana were carefully considered. Two requests for new service were granted; the reason why the others were denied was fully explained.

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301 *et seq.*:

TITLE I—GENERAL PROVISIONS

* * * * *

DECLARATION OF POLICY: THE BOARD

SEC. 102 [72 Stat. 740, 49 U.S.C. 1302]. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * * *

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401 [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371]. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

* * * * *

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * *

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